Supreme Court, U.S.
FILED
JAN 27 1995
OFFICE OF THE CLERK

(3)

NO. 94-1015

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DANIEL G. GELLERT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mark Hicks, Esq.
HICKS, ANDERSON & BLUM, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, FL 33132
(305) 374-8171
Attorneys for Respondent,
Travelers Insurance Company

BEST AVAILABLE COPY

QUESTION PRESENTED[1]

Whether the Eleventh Circuit Court of Appeals properly denied a petition for writ of mandamus and properly refused to compel the district court to rule on motions for summary judgment where the district court denied the motions for summary judgment after the petition was filed.

---

[1] Although Petitioner Daniel G. Gellert ("Gellert") raises six "Questions Presented" in his petition, the questions that Gellert presents have not been resolved in the lower courts and have not been properly preserved for certiorari review in this Court as will be discussed in the argument portion of this response.

LIST OF PARTIES[2]

Air Line Pilots Association
Charles Copeland
Eastern Airlines, Inc.
Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots
Eastern Airlines Retirement Board a/k/a Pension Dispute Board
Daniel G. Gellert
Alan C. Gibson
Jack N. Mogus
The Honorable K. Michael Moore
Pension Benefit Guaranty Corporation
William R. Tegtman
Travelers Insurance Company

---

[2] All of the parties listed, other than Gellert, the plaintiff below, and the Honorable K. Michael Moore, the district court judge, were named as defendants in Gellert's third amended complaint, which was the operative complaint at the time Gellert filed the petition for writ of mandamus. The third amended complaint has since been stricken and individual defendants Charles Copeland, Alan C. Gibson, Jack N. Mogus, and William R. Tegtman have been dismissed from the underlying action.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

LOWER COURT ORDERS AND JUDGMENTS . . . vi

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

CONCLUSION 24

TABLE OF AUTHORITIES

PAGE

CASES

Abbs v. Sullivan,
963 F. 2d 918 (7th Cir. 1992) 15

Bagwell v. Brannum,
533 F. Supp. 362 (N.D. Ga. 1982) 18

Communications Workers of America v.
American Tel. & Tel. Co.,
932 F. 2d 199 (3d Cir. 1991) 15

Dye v. Kansas State Supreme Court,
803 F. Supp. 1379 (D. Kan. 1993) 12

Hepperle v. Johnston,
590 F. 2d 609 (5th Cir. 1979) 22

Johnson v. Bechtel Assoc. Prof. Corp.,
801 F. 2d 412 (D.C Cir. 1986) 10, 11, 12

Kerr v. United States District Court,
426 U.S. 394 (1976) 15

Missouri v. Jenkins,
495 U.S. 33 (1990) 10

Penn-Central Merger & N & W Inclusion Cases,
389 U.S. 486 (1968) 14

Taylor v. Freeland & Kronz,
112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) 21

United States v. DiLapi,
651 F. 2d 140 (2d Cir. 1981),
cert. denied, 455 U.S. 938 (1982) 12

United States v. Gardner,
464 F. 2d 614 (9th Cir. 1972) 11, 12

United States v. Williams,
112 S.Ct. 1725, 118 L.Ed.2d 352 (1992) 21

Williams v. Simons,
355 U.S. 49 (1957) 14

Wright v. South Ark. Regional Health Cent., Inc.,
800 F. 2d 199 (8th Cir. 1986) 15, 16

Zerilli v. Thornton,
428 F. 2d 476 (6th Cir. 1970) 19

OTHER AUTHORITIES

28 U.S.C. § 1254 2

28 U.S.C. § 2102 . . . . . 10, 13

Fed. R. App. P. 40, 41 . . . . . 10, 11, 12

Fed. R. Civ. P. 12 17

Local Rule 7.1, United States District Court
for the Southern District of Florida 16

Supreme Court Rule 10.1 2

Supreme Court Rule 13.1, 30.2 13

Supreme Court Rule 14.5 22

LOWER COURT ORDERS AND JUDGMENTS

United States District Court, Southern District of Florida
Omnibus order on pending motions
(Appendix 10)

United States Court of Appeals, Eleventh Circuit
Order denying petition for writ of mandamus
(Appendix 11)

United States Court of Appeals, Eleventh Circuit
Correspondence that the order denying the petition for writ of mandamus is issued in lieu of a mandate
(Appendix 12)

United States Court of Appeals, Eleventh Circuit
Order denying motion for reconsideration
(Appendix 13)

STATEMENT OF JURISDICTION[3]

The order from the Eleventh Circuit Court of Appeals upon which review is sought denies a petition for writ of mandamus because the petitioner has an adequate remedy by appeal.[4] This Court does not have jurisdiction to review the order because the petition for writ of certiorari was untimely filed. Even if the petition had been timely filed, this Court

---

[3] Gellert does not set forth the grounds for invoking this Court's jurisdiction in his petition, but instead he improperly uses this section to argue issues that have yet to be resolved in the lower courts and to inject other unrelated court proceedings before this Court.

[4] Gellert's appendix contains three other lower court orders. Two of these orders were entered by the district court after Gellert filed his petition for writ of mandamus in the Eleventh Circuit Court of Appeals. The other order dismisses an appeal for lack of jurisdiction because the order appealed was non-final and nonappealable. Gellert apparently appended these orders to his petition for writ of certiorari to provide this Court with background information. Certiorari review of these orders is improper because (1) Gellert's petition seeking review of all three orders is untimely; and (2) this Court does not have certiorari jurisdiction to grant direct review of district court orders.

has no jurisdiction pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 10.1 because the issue to be reviewed is now moot and an adequate remedy by appeal is available after final judgment.

STATEMENT OF THE CASE

This action originated in the District Court of the Southern District of Florida ("district court") when petitioner Daniel G. Gellert ("Gellert"), plaintiff below, filed a two-count complaint on May 9, 1990, against various defendants [not including Travelers Insurance Company ("Travelers")] to recover retirement and pension benefits allegedly owing to him. (App. 1). Thereafter, the district court dismissed count I[5] of Gellert's amended complaint with prejudice because it was time barred and granted individual defendants

[5] This count sought to vacate a decision of the Eastern Airlines Retirement Board a/k/a Pension Dispute Board, which found Gellert ineligible for disability retirement benefits.

Mogus' and Copeland's motions to dismiss. (App. 2).

Gellert, acting pro se, then filed a ten-count first amended complaint against numerous defendants [Travelers was named as a defendant but was never served or notified of this action] on January 30, 1992, alleging claims under RICO, 18 U.S.C. §1961 et seq.; ERISA, 29 U.S.C. § 1132 et seq.; 42 U.S.C. § 1983; statutory and common law of Florida, and under the laws of the Workers' Compensation Board. (App. 3). The district court struck plaintiff's first amended complaint sua sponte because it "included Counts and named Defendants which were previously dismissed." (App. 4). The district court granted Gellert leave to amend the complaint and ordered that the amended complaint "SHALL NOT include reference to any Counts or any Defendants previously dismissed" (emphasis in the original).

Contrary to the express terms of the district court's order, Gellert then filed a third amended complaint against

various defendants [Travelers was served for the first time] alleging virtually the same causes of action contained in the first amended complaint that was struck. (App. 5). The third amended complaint also named defendants that the district court had previously dismissed from the action.

On May 28, 1992, Travelers moved to strike or dismiss Gellert's third amended complaint on grounds that the complaint was in violation of the district court's previous order or that it was impermissibly vague and ambiguous. (App. 6). Notwithstanding Travelers' pending motion to strike or dismiss the third amended complaint, Gellert moved for summary judgment based on the third amended complaint. (App. 7). Travelers responded by moving to strike or stay Gellert's motion for summary judgment pending resolution of its outstanding motion to strike or dismiss the third amended complaint. (App. 8).

Before the district court ruled on either Travelers'

motion to strike or dismiss the third amended complaint or Gellert's motion for summary judgment, Gellert filed a petition for writ of mandamus in the Court of Appeals for the Eleventh Circuit ("court of appeals"). (App. 9). Gellert sought issuance of a writ of mandamus solely to compel the district court to rule on his motions for summary judgment because the district court had allegedly failed to set a hearing or dispose of his motions in a timely manner in accordance with its local rules.[6] Gellert also asserted that he was entitled to summary judgment because the defendants, including Travelers, had allegedly defaulted in failing to properly respond to his summary judgment motions and, therefore, no genuine issue of material fact existed. Gellert's petition completely ignored that under Federal Rule of Civil Proce-

---

[6] Gellert, however, did not file any motion in the district court to compel it to rule on his motion for summary judgment after the clerk of the district court issued a "Notification of 90 days expiring and ripeness for hearing" on Gellert's motion for summary judgment.

dure 12 Travelers was not required to respond to his third amended complaint, much less his summary judgment motion based thereon, until after the district court ruled on Travelers' pending motion to strike or dismiss the third amended complaint.

After Gellert filed his petition for writ of mandamus but before the court of appeals ruled on it, the district court struck the third amended complaint and denied Gellert's motions for summary judgment based on the third amended complaint. (App. 10). The district court further ordered that Gellert "may file appropriate substantive motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure after completion of discovery and only upon leave of Court." Subsequently, the court of appeals denied Gellert's petition for writ of mandamus because "petitioner has an adequate remedy by appeal." (App. 11). Gellert filed the instant petition for writ of certiorari.

SUMMARY OF ARGUMENT

The instant petition should be denied because it is untimely, the issue sought to be reviewed has been rendered moot, and an adequate remedy by appeal is available after final judgment.

Dismissal of the petition is warranted because it is untimely. Gellert had 90 days from the date of the order denying his petition for writ of mandamus within which to petition for certiorari review or file for an extension of time, because the mandate issued immediately. Gellert's motion for reconsideration filed after the mandate issued was a legal nullity and did not stay the time period for filing a petition for writ of certiorari. Consequently, Gellert's petition for writ of certiorari filed more than nine months after the order denying his petition for writ of mandamus is untimely and requires dismissal.

Additionally, the relief that Gellert requested on

mandamus in the court of appeals was obtained and therefore renders moot any consideration of the merits of his petition. Gellert sought to compel the district court to rule on his motions for summary judgment against all of the defendants, including Travelers. Shortly after he filed his petition for writ of mandamus, however, the district court entered an omnibus order that, inter alia, denied Gellert's motions for summary judgment. As a result, Gellert obtained the relief that he requested on mandamus and the propriety of the court of appeals' denial of mandamus is now moot.

The petition should also be denied because the court of appeals correctly found that Gellert has an adequate remedy by appeal after final judgment is rendered. Moreover, Gellert's petition seeks this Court's review of issues that have not been resolved in the lower courts and that were not before the court of appeals in the underlying petition for writ of mandamus. After a final judgment is rendered, Gellert

has an adequate remedy by appeal to review the propriety of the district court's order denying his motions for summary judgment as well as the issues he has improperly brought before this Court at this time. The petition accordingly should be denied. The petition furthermore should be denied on the additional ground that it fails to comply with this Court's rules governing preparation of petitions.

ARGUMENT

Gellert seeks a writ of certiorari from an order of the court of appeals denying his petition for writ of mandamus to compel the district court to consider and decide his motions for summary judgment. This Court should deny Gellert's petition for writ of certiorari because it is untimely, the issue to be reviewed is now moot, Gellert has an adequate remedy by appeal after final judgment is rendered in the district court and the petition violates the rules for preparing petitions.

A. Dismissal is warranted since the petition was untimely filed

A petition for writ of certiorari must be dismissed if it is untimely filed. As this Court has held:

> Title 28 U.S.C. § 2101 ... requires that a petition for certiorari in a civil case be filed within 90 days of the entry of judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the [] petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33, 45 (1990). The time for filing a petition for writ of certiorari may be tolled only where the mandate is stayed by the court of appeals or where the mandate is stayed by a timely filed petition for rehearing in the court of appeals. Fed. R. App. P. 41. The court of appeals may shorten both the time for issuing its mandate and the time for filing rehearing petitions. Fed. R. App. P. 40(a); 41(a); *Johnson v. Bechtel Assoc. Prof. Corp.*, 801 F.

2d 412, 415 (D.C. Cir. 1986). Furthermore, the mandate issues when the court releases a certified copy of its order or judgment. Fed. R. App. P. 41(a) ("A certified copy of the judgment any a copy of the opinion of the court, if any, ... shall constitute the mandate, unless the court directs that a formal mandate issue"); *see Johnson*, *supra* (certified copy of the judgment constituted the mandate of the court of appeals, and, therefore, the date that certified copy of the judgment was transmitted to the district court was the date that the mandate issued); *United States v. Gardner*, 464 F. 2d 614, 615 (9th Cir. 1972) (certified copies of the court of appeals' judgment constituted the mandate).

On February 23, 1994, the court of appeals entered an order denying Gellert's petition for writ of mandamus "because petitioner has an adequate remedy by appeal". (App. 11). In correspondence dated the same day, the court of appeals sent Gellert a certified copy of its order and in-

formed him that its order denying his petition for writ of mandamus was issued in lieu of a formal mandate. (App. 12). Thus, the order of February 23, 1994 constitutes the court of appeals' mandate and plainly eliminated Gellert's time for filing a petition for rehearing. Fed. R. App. P. 41(a); *Johnson*, *supra*; *Gardner*, *supra*.

Once the mandate issues, a petition for rehearing is unauthorized and cannot be filed to stay the mandate since the mandate has already issued. *See Johnson*, *supra* (issuance of mandate in court of appeals necessarily eliminates time for filing petition for rehearing); *United States v. DiLapi*, 651 F. 2d 140, 144 (2d Cir. 1981) (filing of petition for rehearing in court of appeals after mandate issues does not revest jurisdiction in that court), *cert. denied*, 455 U.S. 938 (1982); *see also Dye v. Kansas State Supreme Court*, 803 F. Supp. 1379, 1383 (D. Kan. 1993) ("usually, the issuance of the mandate means the end of litigation" in the

court issuing the mandate). Therefore, Gellert's petition for rehearing was unauthorized and did not stay the mandate or toll the time for seeking certiorari review.

Consequently, Gellert had 90 days from February 23, 1994 within which to file a petition for writ of certiorari or seek an extension of time for filing the petition. 28 U.S.C. § 2102(c); Sup. Ct. R. 13.1, 30.2. Gellert did not seek an extension of time for filing his petition in this Court until October 3, 1994, which was 222 days after the February 23, 1994 order was entered. Because Gellert failed to timely file his petition for writ of certiorari, this Court should dismiss the petition.

B. The petition should be dismissed because the question presented is moot

Apart from the untimely filing of Gellert's petition for writ of certiorari in this Court, the question presented for review -- whether the court of appeals properly refused to compel the district court to rule on motions for summary

judgment -- is now moot. While the petition for writ of mandamus was pending in the court of appeals, the district court entered an omnibus order that, inter alia, denied Gellert's motions for summary judgment based on the third amended complaint and struck the third amended complaint. (App. 10). Because the district court has ruled on Gellert's motions for summary judgment, which was the sole relief that Gellert sought on mandamus, the question presented is now moot. *Cf. Williams v. Simons*, 355 U.S. 49 (1957) (petition for writ of mandamus or prohibition to compel a district court to decide a motion for a temporary injunction and a motion to dismiss was rendered moot since the district court dismissed the complaint after the petition was filed and thereby precluded consideration of the merits of the issues presented); *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968) (petition for writ of mandamus or certiorari challenging a district court order staying certain

proceedings was rendered moot when the district court dissolved the stay order). The petition for writ of certiorari accordingly should be dismissed.

C. An adequate remedy is available by appeal after final judgment is rendered

The court of appeals properly denied Gellert's mandamus petition because he has an adequate remedy to review the district court's rulings by appeal from any final judgment ultimately entered in the case. It is well settled that mandamus may not be used as a mere substitute for appeal. *Kerr v. United States District Court*, 426 U.S. 394 (1976). Moreover, mandamus is inappropriate to review an order on a parties' motion for summary judgment. *Communications Workers of America v. American Tel. & Tel. Co.*, 932 F. 2d 199, 210 (3d Cir. 1991). Rather, an adequate and proper remedy to review an order granting or denying summary judgment is by appeal after entry of a final judgment. *Abbs v. Sullivan*, 963 F. 2d 918, 923 (7th Cir. 1992); *Wright v.*

South Ark. Regional Health Cent., Inc., 800 F. 2d 199, 202 (8th Cir. 1986). Therefore, the court of appeals' denial of the petition on the ground that Gellert had an adequate remedy on final appeal is amply supported by law.

The court of appeals' denial of the petition for writ of mandamus was correct on the merits as well. Gellert premised his petition for writ of mandamus on the district court's alleged failure to set a hearing or rule on his motions for summary judgment within ten days of the clerk's notice of ripeness for hearing pursuant to the district court's local rule 7.1(B). Gellert further asserted that he was entitled to summary judgment under the district court's local rule 7.1(C), which provides that a party's failure to serve and file an opposing memorandum within the time prescribed "may be deemed sufficient cause for granting the motion by default." Gellert contended that the defendants, including Travelers, had allegedly failed to properly respond to his

summary judgment motions, and, therefore, they were in default and he was entitled to summary judgment as a matter of law.

However, before Gellert had moved for summary judgment based on the third amended complaint, Travelers, as well as the other defendants, had moved to strike or dismiss that complaint because it violated a district court order by alleging previously dismissed counts and naming previously dismissed defendants. Therefore, the district court had not yet determined the viability of the third amended complaint when Gellert claimed that he was entitled to judgment based thereon. Travelers' motion to strike or dismiss the third amended complaint suspended the time for serving an answer until disposition of Travelers' motion. Fed. R. Civ. P. 12. It follows that since Travelers did not have to answer the third amended complaint, Travelers did not have to respond to Gellert's motion for summary judgment thereun-

der until and unless the complaint was deemed sufficient. *See Bagwell v. Brannum*, 533 F. Supp. 362, 363 (N.D. Ga. 1982) (court must pass on dispositive motion to remand prior to reaching motion for summary judgment).

In an abundance of caution, however, Travelers moved to strike or stay Gellert's motion for summary judgment until its motion to strike or dismiss the third amended complaint was resolved. No default therefore could be entered against Travelers.

It is plain from the foregoing, that a ruling by the district court on Gellert's motions for summary judgment was premature. Therefore, the court of appeals properly denied the petition for writ of mandamus to compel such ruling.[7]

---

[7] Even assuming arguendo that Travelers defaulted, which is denied under this record, the district court properly declined to enter a default in its discretion. Gellert has failed to show that the court of appeals' should have compelled the district court to rule differently than it did on the

Gellert furthermore misapprehends the scope of this Court's certiorari review and raises six "Questions Presented" in his petition, none of which are ripe for appellate review or properly before this Court. Gellert's petition for writ of certiorari is grounded on the court of appeals' denial of mandamus to compel the district court to rule on his motions for summary judgment under the third amended complaint. However, in his petition for writ of certiorari, Gellert goes beyond seeking review of the court of appeals' denial of mandamus and requests this Court to decide the merits of the now operative fourth amended complaint pending in the district court, which the district court has not yet ruled upon, and to reverse a district court order dismissing certain individual defendants, which the court of appeals has

---

motions for summary judgment. *See Zerilli v. Thornton*, 428 F. 2d 476, 477 (6th Cir. 1970) ("mandamus cannot be used to compel a judge to decide a case a particular way").

not passed upon either.[8]

Gellert cannot circumvent the proper procedure for having his causes of action against the defendants decided in the lower courts. Rather, this action must be resolved in the district court and then reviewed on appeal in the court of appeals before Gellert can attempt to invoke this Court's jurisdiction. Certiorari relief is premature because Gellert has an adequate remedy by appeal after a final judgment is rendered. Gellert fails to assert any basis for invoking this Court's certiorari jurisdiction.

This Court has steadfastly adhered to a longstanding rule that precludes granting certiorari where the questions

---

[8] For example, Gellert seeks to have this Court review a previous order of the district court granting arbitral immunity to individual defendants Copeland and Mogus dismissing these defendants in the case below. In addition, Gellert seeks review of his pending claims, as well as for claims that have been previously arbitrated, involving disputes over the denial of his pension benefits and his termination from employment at Eastern based on the nonpayment of union dues.

presented have not been pressed or passed upon below. *E.g. United States v. Williams*, 112 S.Ct. 1725, 118 L.Ed.2d 352, 361 (1992); *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644, 118 L.Ed.2d 280, 288 (1992), *citing Youakim v. Miller*, 425 U.S. 231, 234 (1976). This rule promotes the certiorari review process by denying review of questions that have not been litigated or decided in the lower courts. *See Taylor, supra.* Thus, certiorari review is properly denied when, as in this case, the questions presented have not been resolved in either the district court or the court of appeals. Neither the fourth amended complaint nor the order dismissing certain individual defendants was considered by the court of appeals in denying the underlying petition for writ of mandamus or by the district court in the first instance. Therefore, any consideration of these issues is beyond this

Court's jurisdiction at this time and certiorari should be denied.[9]

D. The petition should be denied because it violates the rules governing preparation of petitions

In addition, Gellert's petition should be denied because it fails to comply with Supreme Court Rule 14.5, which provides that:

> The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying the petition.

In his petition, Gellert does not provide this Court with any basis for invoking this Court's jurisdiction; improperly ar-

---

[9] Gellert also implicitly suggests in his petition that this Court should compel the district judge to recuse himself. Gellert, however, did not seek to recuse the district judge in his petition for writ of mandamus although he did file a memorandum in the court of appeals alleging that the district judge was corrupt and biased. In any event, Gellert has not complied with 28 U.S.C. § 144's requirements for recusal of the district judge in the court's below. *See Hepperle v. Johnston*, 590 F. 2d 609, 611 n.2 (5th Cir. 1979).

gues the merits of the writ in the portion of the petition that is reserved for outlining the constitutional provisions, statutes and treaties which are the subject of the writ; improperly argues the merits of the writ in an unauthorized section entitled "Defendants Defaulted Under Rule 56"; and does not, because he cannot, show this Court when the federal questions sought to be reviewed were first raised in the lower courts, the method and manner of raising the federal questions in the lower courts, and the way in which the federal questions were passed upon below. The result is an inaccurate and misleading portrayal of the proceedings below and an unfounded request to review issues that are currently beyond this Court's jurisdiction. Accordingly, this Court should deny the petition because Gellert failed to present his petition with accuracy, brevity and clarity.

In sum, Gellert has failed to assert any ground upon which this Court's jurisdiction may be invoked and has failed

to demonstrate why certiorari should be granted. Furthermore, Gellert's petition was untimely filed, the question presented is now moot, and an adequate remedy by appeal is available after final judgment is rendered. The petition accordingly should be denied.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, Respondent Travelers respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

HICKS, ANDERSON & BLUM, P.A.
New World Tower - Suite 2402
100 North Biscayne Blvd.
Miami, FL 33132
(305) 374-8171

By: /s/ Mark Hicks
Attorneys for Respondent,
Travelers Insurance Company